Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147

REPLY COMMENTS OF CBEYOND COMMUNICATIONS, LLC, ITC^DELTACOM COMMUNICATIONS, INC., KMC TELECOM III, LLC, KMC TELECOM V, INC., NUVOX COMMUNICATIONS, INC., XO COMMUNICATIONS, INC. AND XSPEDIUS COMMUNICATIONS, LLC

Cbeyond Communications, LLC ("Cbeyond"), ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom"), KMC Telecom III, LLC and KMC Telecom V, Inc. (collectively "KMC"), NuVox Communications, Inc. ("NuVox"), XO Communications, Inc. ("XO") and Xspedius Communications, LLC on behalf of itself and its operating entities (collectively "Xspedius") (hereinafter the "CLECs") hereby respectfully submit their reply to comments in response to BellSouth Telecommunications, Inc.'s ("BellSouth's") Petition for Waiver of certain of the Federal Communications Commission's ("FCC's" or "Commission's") rules regarding Enhanced Extended Loops ("EELs").[1] The CLECs submit these reply comments to reiterate their position that BellSouth has failed to demonstrate unique facts and special circumstances necessary for a waiver of the FCC's EEL rules as well as to specifically address two points raised in comments filed in this proceeding. First, the CLECs underscore that no commenter supports BellSouth's Petition on the grounds upon

[1] *Pleading Cycle Established for Comments on BellSouth's Petition for Waiver*, Public Notice, CC Docket Nos. 01-338, 96-98, 98-147, DA 04-404 (Feb. 18, 2004). Comments in response to the FCC's Public Notice were filed on March 19, 2004.

which it was filed. Secondly, the CLECs refute the comments submitted by Qwest, SBC and Verizon that suggest that the D.C. Circuit, in its *USTA II* decision, vacated the high-cap loop unbundling requirements or the FCC's EEL and commingling rules.[2] The CLECs' positions regarding the aforementioned issues are discussed in detail below.

I. NO COMMENTER SUPPORTS BELLSOUTH'S PETITION ON THE GROUNDS ASSERTED BY BELLSOUTH

In its Petition, BellSouth attempted to justify its need for a waiver based on grounds that no commenter supported and that many opposed. In particular, BellSouth asserted that due to accelerated successful contract negotiations, as well as alleged operational modifications and "stranded investment" it needed to implement the EEL rules set forth in Triennial Review Order ("*TRO*"),[3] it should be granted a limited waiver. No commenter echoed or supported BellSouth's claims. Instead, those commenters supporting BellSouth's Petition recognized that circumstances have significantly changed since BellSouth filed its Petition on February 18, 2004. Most notably SBC states that "...the specific relief BellSouth requests thus ***has been overtaken*** by the *USTA II* decision...."[4] Qwest made a similar acknowledgement.[5] Relief cannot be granted based upon *USTA II,* or any factors other than those presented by BellSouth in its Petition. Moreover, the record makes clear that relief also is not justified on the grounds advanced by BellSouth.

---

2 *USTA v. FCC*, No. 00-1012 (D.C. Cir., March 2, 2004) ("*USTA II*").

3 *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 & 98-147, *Report and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17342-43, 17354, ¶¶ 579, 597 (2003) ("*TRO*")

4 SBC Comments at 2.

5 *See* Qwest Comments at 1 ("Although circumstances have changed significantly since BellSouth filed its Petition, the general relief it seeks is still warranted.").

A. Commenters Refute BellSouth's Operational Argument and Confirm that EEL Conversions Are Essentially Billing Changes

Comments submitted in this proceeding support the CLECs' position that BellSouth's claims regarding operational modifications and stranded investment are overwrought. BellSouth has been converting special access circuits to EELs for years already without such impediments. In order to convert a special access circuit to an EEL, BellSouth need only effectuate a billing modification. Notably, this position is supported by Sprint, which, like BellSouth is an ILEC. Specifically, Sprint, in its comments, states that "if a circuit is working today and all that a requesting carriers seeks is the conversion of one element (such as a loop) to a UNE, this request should not require any physical changes whatsoever. It need only involving a billing change...."[6] As demonstrated by these comments, not only did BellSouth failed to provide any credible evidence for its assertions regarding operational modifications required to implement the EEL rules in its Petition, but there is no support for its assertions from any of the commerters.

B. The Record Contains No Support for BellSouth's "Stranded Investment" Argument

One of BellSouth's most exaggerated and unsubstantiated arguments is that if it is not granted a waiver of the EEL rules, it will result in "significant stranded capital."[7] Comments in this proceeding clearly refute BellSouth's position. For example, MCI rebuts BellSouth's capital investment argument by stating that it "does not expect to request conversions that require physical network changes." MCI goes on to comment that "[n]one of MCI's circuits resembles the circuits

---

6 *See* Sprint Comments at 7-8.

7 BellSouth Petition at 4.

BellSouth described as requiring capital expenditures."[8] These comments echo the CLECs' experience that EEL conversions do not result in stranded network investment.

II. COMMISSION HIGH CAP LOOP UNBUNDLING AND EEL COMMINGLING RULES REMAIN IN EFFECT

In addition to underscoring the fact that there is no support for the merits of BellSouth's Petition, the CLECs also seeks to make clear the *USTA II* decision in no way relieved ILECs of their obligation to provide unbundled high capacity loops and EELs. The *USTA II* decision did not vacate the Commission's rules with regard to these UNEs and Combinations. Furthermore, to the extent there is any change in the law with regard to CLECs' ability to obtain new EELs, these UNE Combinations will remain available under BellSouth's interconnection agreements until such Agreements are amended pursuant to the change of law provisions contained therein. Finally, regardless of any potential change of law amendment, conversions will remain a requirement and EELs will be available commingled form and perhaps all-UNE form pursuant to interim FCC rules or state unbundling rules.

A. *USTA II* Did Not Vacate the Commission's High Capacity Loop and EEL Commingling Rules

The RBOC commenters disingenuously argue that the *USTA II* decision vacated the Commission's high capacity loop unbundling an EEL commingling rules.[9] Specifically Qwest states that, "[i]f the *USTA II* decision takes effect without Commission adopting interim rules, the EEL requirements will be without force in light of the court's vacation of the high-capacity loop and transport impairment determinations."[10] Additionally, Verizon states that "[t]he D.C. Circuit has now

---

8 MCI Comments at 9.

9 *See* Comments of Qwest at 2, n. 2; Verizon Comments at 1; SBC Comments at 2.

10 Comments of Qwest at 2, n.2.

vacated both the Commission's provisional determination that requesting carriers are impaired without access to high capacity dedicated facilities and the Commission's delegation of authority to state commissions to determine which high-capacity dedicated facilities must be unbundled under federal law."[11] With regard to EELs, Verizon states, "[m]oreover, the Court remanded back to the Commission the issue of making an impairment determination associated specifically with EELs".[12]

Although the D.C. Circuit did vacate the *TRO* with respect to subdelegation of the Commission's section 251(d)(2) responsibilities,[13] it did not vacate the Commission's current high-capacity loop unbundling rules. Neither did the D.C. Circuit vacate the Commission's EEL rules. The RBOCs have overstated the holding of *USTA II* and the Commission should make clear that its rules and national impairment findings will remain in place until they are replaced.

B. High Capacity Loop and Transport, EEL and Commingled EEL Requirements Remain Available in BellSouth Interconnection Agreements

Regardless of whether the *USTA II* decision becomes effective on day 60 or at some point thereafter,[14] the current high-cap loop and transport, EEL and commingled EEL requirements included in BellSouth interconnection agreements will remain in place until those agreements are amended. As aptly stated, by AT&T, provisions included in BellSouth's interconnection agreements are binding "independent of any Commission rules."[15] Moreover, even if such amendments are implemented, conversions will remain a requirement and EELs will be available commingled form

---

11 Comments of Verizon at 1.

12 *Id.*

13 *See USTA* slip. op. at 12-16.

14 The D.C. Circuit temporarily stayed its vacatur until the later of (1) the denial of any petition for rehearing or rehearing en banc or (2) 60 days from the date of the decision. *Id.* at slip. op. 62.

15 Comments of AT&T at 5.

and perhaps all-UNE form pursuant to interim FCC rules or state unbundling rules. Accordingly, BellSouth should not be granted a waiver to abrogate its interconnection obligations.[16]

III. CONCLUSION

For the foregoing reasons and the reasons included in the CLECs' initial Opposition Comments, the CLECs urge the Commission to deny BellSouth's Petition.

Respectfully submitted,

By: Heather Hendrickson

John J. Heitmann
Heather T. Hendrickson
KELLEY DRYE & WARREN LLP
1200 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600

Counsel to Cbeyond Communications, LLC, ITC^DeltaCom Communications, Inc., KMC Telecom III, LLC, KMC Telecom V, Inc., NuVox Communications, Inc., XO Communications, Inc. and Xspedius Communications, LLC

Dated: April 5, 2004

[16] *See id.*, at 8 ("A 'waiver' therefore, would be tantamount to an indefinite suspension of BellSouth's obligations to provide EELs, which would be palpably contract to the public interest.").